

HONORABLE BENJAMIN H. SETTLE

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

HP TUNERS, LLC, a Nevada limited liability company,	)	CASE NO. 3:17-cv-05760-BHS
	)	
Plaintiff,	)	<b>PLAINTIFF'S RESPONSE IN</b>
	)	<b>OPPOSITION TO DEFENDANTS'</b>
vs.	)	<b>MOTION TO QUASH SUBPOENA</b>
	)	<b>ISSUED TO THIRD PARTY</b>
KEVIN SYKES-BONNETT and SYKED ECU TUNING INCORPORATED, a Washington corporation, and JOHN MARTINSON,	)	<b>TEAMVIEWER US, LLC</b>
	)	<b><u>NOTING DATE: NOVEMBER 30, 2018</u></b>
	)	<b><u>ORAL ARGUMENT REQUESTED</u></b>
Defendants.	)	

Plaintiff HP Tuners, LLC ("HP Tuners" or "Plaintiff"), by its attorneys, hereby submits this Response in Opposition to Defendants' Motion to Quash the Subpoena Issued to Third Party TeamViewer US, LLC, filed on November 13, 2018 (Dkt. 121; the "Motion to Quash").

**RELEVANT BACKGROUND**

On October 29, 2018, Plaintiff filed a Notice of Intent to Serve a Subpoena to Produce Documents on TeamViewer US, LLC (the "TeamViewer Subpoena" or the "Supboena") seeking relevant information well within the broad right to discovery provided under Fed. R. Civ. P. 26(b). Based upon specific evidence acquired during the course of discovery in this matter,

1 Plaintiff reasonably believes that third party TeamViewer US, LLC (“TeamViewer”) is in  
2 possession of direct evidence that Defendant Kevin Sykes-Bonnett (“Sykes-Bonnett”) obtained  
3 and distributed Plaintiff HP Tuners’ intellectual property for his own profit and the profit of his  
4 co-defendants Syked-Ecu Tuning, Inc. and John Martinson (together, “Defendants”), in violation  
5 of applicable federal and state law.

6 TeamViewer is a technology company that focuses on cloud-based technologies to enable  
7 remote desktop access and online collaboration. Plaintiff has learned (and Defendants have  
8 admitted) that Sykes-Bonnett used TeamViewer extensively to collaborate with clients and  
9 colleagues, as well as to unlawfully distribute HP Tuners’ intellectual property. Specifically,  
10 pursuant to the sworn deposition testimony provided by Ellis Groo (“Groo”), Sykes-Bonnett  
11 used TeamViewer to unlawfully generate discounted HP Tuners credits for Groo, for use in  
12 conjunction with an HP Tuners interface:

14 Q: Now, when [Sykes-Bonnett] would generate the credits for you, would this be  
15 done in person?

16 A: No. He’d do it online.

17 Q: How did he do it online?

18 A: He would – he used to do it through TeamViewer. He would sign into my  
19 computer and do it.

20 Deposition of Ellis R. Groo, dated September 24, 2018 (“Groo Depo”), 12:15-20.

21 Furthermore, Sykes-Bonnett also admitted under oath that he had generated HP Tuners  
22 keys for third parties, including Groo, using TeamViewer. Deposition of Kevin Sykes-Bonnett,  
23 dated September 25, 2018 (“Sykes-Bonnett Depo”), 32:11-33:5, 58:22-23; 175:13-15. However,  
24 Mr. Sykes-Bonnett is unable to remember persons with whom he has conducted TeamViewer  
25

1 sessions. (Sykes-Bonnett Depo, at 172:10-12). Consequently, the documents from TeamViewer  
2 are highly relevant and necessary in order to identify third parties to whom Defendants have  
3 issued HP Tuners application keys and/or credits. TeamViewer is undoubtedly in possession of  
4 records demonstrating Sykes-Bonnett's unlawful distribution of HP Tuners credits to deponent  
5 Groo, as well as to other as-yet-unidentified third parties.

6  
7 Plaintiff has also learned that TeamViewer can likely provide evidence demonstrating  
8 that Sykes-Bonnett is wrongfully in possession of HP Tuners' intellectual property. In August  
9 2018, an anonymous informant provided HP Tuners with images from a TeamViewer session  
10 between Sykes-Bonnett and an unidentified third party. The images consisted of screenshots of  
11 HP Tuners' proprietary files being stored on Sykes-Bonnet's computer. Declaration of Keith  
12 Prociuk in Support of Plaintiff's Renewed Emergency Motion for Temporary Restraining Order  
13 and Preliminary Injunction, Dkt. 62-1, ¶ 5.

14 Accordingly, Plaintiff reasonably believes that (1) Sykes-Bonnett generated unlawful  
15 discounted application keys through TeamViewer for Ellis Groo and other individuals, and (2)  
16 that there are TeamViewer records demonstrating his unlawful distribution of HP Tuners'  
17 application keys and/or credits to third parties. Plaintiff is therefore entitled to acquire from  
18 TeamViewer the requested records and files that will confirm Sykes-Bonnett's use and  
19 distribution of Plaintiff's confidential information.  
20

21 Contrary to Defendants' baseless contention otherwise, and due to Defendants' own bad  
22 faith discovery tactics, Plaintiff has no other discovery method at its disposal through which it  
23 may obtain the relevant TeamViewer records and/or files. Despite repeated discovery requests,  
24 Defendants have failed to provide records or files from any TeamViewer sessions. Further,  
25 Sykes-Bonnett was questioned extensively at deposition regarding his use of TeamViewer, but

provided evasive responses. Sykes-Bonnett refused to provide complete information regarding with whom he conducted TeamViewer sessions, the content of those TeamViewer sessions, or when such sessions occurred. Instead, he merely recounted “I don’t remember.” (Sykes-Bonnett Depo, at 172:10-12). As set forth in greater detail below, despite admitting that he used TeamViewer to communicate with other individuals and to generate HP Tuners application keys, Sykes-Bonnett repeatedly claimed at deposition that he simply could not remember any specific information regarding his use of TeamViewer. Thus, Plaintiff has been forced by Defendants’ own incomplete and misleading discovery responses to issue a third-party subpoena upon TeamViewer in order to obtain the relevant records from Defendants’ TeamViewer sessions.

### **ARGUMENT**

Pursuant to Rule 26(b), the scope of permissible discovery is extremely broad. A party “may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense. . . Information within this scope of discovery need not be admissible in evidence to be discoverable.” Fed. R. Civ. P. 26(b). The term “relevant” is construed broadly to encompass “any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978); *see also Graham v. Casey’s Gen. Stores, Inc.*, 206 F.R.D. 251, 253 (S.D.N.Y. 2002) (“Information is generally discoverable under the Federal Rules of Civil Procedure. The minimal showings of relevance and admissibility hardly pose much of an obstacle for an inquiring party to overcome.”).

The scope of discovery that can be requested through a subpoena under Rule 45 is the same as the scope under Rule 26(b). Fed. R. Civ. P. 45 Advisory Comm.’s Note (1970) (“[T]he scope of discovery through a subpoena is the same as that applicable to Rule 34 and other

discovery rules.”); Fed. R. Civ. P. 34(a) (“A party may serve on any other party a request within the scope of Rule 26(b).”). Finally, “[o]n a motion to quash a subpoena, the moving party has the burden of persuasion under Rule 45(c)(3).” *CallSave Communs., Inc. v. WaveMarket, Inc.*, 2014 U.S. Dist. LEXIS 88073, at \*5, No. C 14-80112 (N.D. Cal., June 26, 2014) (internal quotations omitted).

### **I. TeamViewer is in Possession of Highly Relevant Information**

The TeamViewer Subpoena seeks information that is relevant to the very foundation of Plaintiff’s claims. Plaintiff alleges that Sykes-Bonnett, in coordination with numerous other individuals, engaged in a campaign to undermine HP Tuners by stealing its trade secrets and proprietary information and distributing unauthorized HP Tuners application keys and/or credits for his own profits. Plaintiff believes that TeamViewer is in possession of evidence specifically demonstrating that Sykes-Bonnett used TeamViewer to distribute discounted HP Tuners application keys and/or credits to third parties.

Moreover, Plaintiff reasonably believes that TeamViewer is in possession of direct evidence that Sykes-Bonnett possesses HP Tuners’ highly confidential intellectual property. Plaintiff has acquired screen shots from a TeamViewer session between Sykes-Bonnett and an unidentified third party which depict, *inter alia*, Plaintiff’s source code files, descriptive documents, folders, and key generator program, all stored on a computer belonging to Sykes-Bonnett. Declaration of Keith Prociuk in Support of Plaintiff’s Renewed Emergency Motion for Temporary Restraining Order and Preliminary Injunction, Dkt. 62-1, ¶ 5. Through the Subpoena, Plaintiff seeks data confirming that Sykes-Bonnett engaged in the TeamViewer session during which the screenshot was taken, and with whom that Teamviewer session was conducted.

1 Further, Plaintiff reasonably believes that TeamViewer is in possession of evidence that  
2 Sykes-Bonnett unlawfully provided discounted HP Tuners tuning credits to third parties.  
3 Specifically, pursuant to the sworn deposition testimony provided by Ellis Groo, Sykes-Bonnett  
4 used TeamViewer to unlawfully generate discounted credits for Groo, for use in conjunction  
5 with an HP Tuners interface:

6 Q: Now, when [Sykes-Bonnett] would generate the credits for you, would this be  
7 done in person?

8 A: No. He'd do it online.

9 Q: How did he do it online?

10 A: He would – he used to do it through TeamViewer. He would sign into my  
11 computer and do it.

12 Groo Depo, 12:15-20. In fact, Defendant Sykes-Bonnett himself confirmed Groo's testimony,  
13 admitting under oath that he had generated HP Tuners keys for third parties, including Groo,  
14 using TeamViewer. Sykes-Bonnett Depo, 32:11-33:5, 58:22-23; 175:13-15.

15  
16 It is imperative that Plaintiff be permitted to confirm, through data provided by  
17 TeamViewer, that the information Plaintiff has thus far acquired through discovery is accurate,  
18 as well as to determine the identities of any and all other individuals who may also have  
19 acquired HP Tuners' proprietary information or received discounted application keys and/or  
20 credits through TeamViewer, in order to fully make its case and obtain adequate relief.  
21 Contrary to Defendants' assertions otherwise, Plaintiff seeks specific, relevant evidence which it  
22 reasonably believes TeamViewer possesses based upon documentary evidence acquired during  
23 discovery as well as sworn deposition testimony.  
24  
25

## II. Plaintiff Has No Other Means of Acquiring the Relevant Information

Despite repeated attempts, Plaintiff has been unsuccessful in obtaining relevant TeamViewer files from Defendants, and thus has no other means of acquiring the relevant files than from TeamViewer itself. Both Ellis Groo and Sykes-Bonnett testified under oath that Sykes-Bonnett generated HP Tuners credits through TeamViewer. Groo Depo, 12:15-20; Sykes-Bonnett Depo, 32:11-33:5, 58:22-23; 175:13-15. However, to date, Defendants have not produced any records from any TeamViewer sessions.

Furthermore, Sykes-Bonnett was questioned extensively with regard to his use of TeamViewer, but failed to provide any substantive response to such questions, instead repeatedly claiming he could not remember any details regarding his use of TeamViewer. *See, e.g.*, Sykes-Bonnett Depo, 143:10-21 (Q: How did [Tim Milliken] communicate [Ken Cannata's] phone number to you? A: I don't remember. . . Q: Was it by TeamViewer? A: I don't remember); 152:2-153:3 (Q: So are you disputing that this is a picture taken during a TeamViewer session you had with someone else? A: I've never seen this picture before. . . Q: You've done TeamViewer sessions before? A: Correct. Q: You're not aware of what the buttons are at the top of a TeamViewer session? A: I – that doesn't look familiar to me); 167:2-3 (Q: Have you ever used any cracked versions of TeamViewer? A: I don't remember.); 172:17-19 (Q: List some of the [customers] that you had TeamViewer sessions with. A: I don't remember all my customers' names. I'm sorry.); 175:25-176:2 (Q: And was there ever keys generated for The Mustang Shop, via TeamViewer or just the one time in person? A: I don't remember.), 177:13-16 (So if Nigel Alexander said that you generated keys for him through TeamViewer sessions, that would be inaccurate? A: I believe so. I don't recall doing that.); 204:12-16 (Q: You know

1 who you conducted TeamViewer sessions with in 2016, 2017, and 2018, correct? A: I don't  
2 remember everybody. I'm sorry. Q: Do you have a memory problem? A: No.).

3 Defendants obfuscation and evasiveness has demonstrated that they are unwilling to be  
4 forthcoming with regard to any facts or details related to their use of TeamViewer, despite  
5 Plaintiff's right to access these highly relevant records, which will most likely prove to be  
6 extremely damaging to Defendants. Accordingly, Plaintiff is left without any means to acquire  
7 the TeamViewer files other than to issue a subpoena upon TeamViewer itself.  
8

### 9 **III. The TeamViewer Subpoena is Narrowly Tailored**

10 The TeamViewer Subpoena is narrowly tailored and well within the purview of the issues  
11 in this case. More specifically, the Subpoena solely requests data related to the specified IP  
12 address and email addresses affiliated with Defendants. Furthermore, the Subpoena is limited to  
13 only non-content data. In compliance with the Electronic Communications Privacy Act of 1986  
14 (the "ECPA"), and mindful that TeamViewer is a third party to this litigation, Plaintiff has  
15 limited its requests to the following non-content data affiliated with Defendants' IP address and  
16 email addresses: identity, address, email address, login details, billing information, account  
17 openings, and log files. As such, Plaintiff deliberately fashioned the Subpoena to solicit three  
18 categories of highly relevant information: (1) confirmation that the screenshots depicting Sykes-  
19 Bonnett's possession of HP Tuners' confidential information are accurate, (2) data surrounding  
20 Sykes-Bonnett's provision of confidential information to Groo, and (3) data indicating Sykes-  
21 Bonnett's provision of confidential information to other third parties.  
22

23 Due in large part to Defendants' failure to provide any detail with regard to their use of  
24 TeamViewer, despite Plaintiff's repeated attempts to acquire such information, Plaintiff is unable  
25 to narrow the Subpoena any further without compromising its ability to obtain the relevant



1 information it requires. Defendants have not provided a list of the individuals and/or entities  
 2 with whom it has engaged in TeamViewer sessions, nor have they provided any TeamViewer  
 3 logs or files that would allow Plaintiff to limit the scope of the Subpoena to a narrower date  
 4 range. Defendants' contention that Plaintiff should have limited the Subpoena to sessions  
 5 involving independent contractors that Defendants have worked with (Dkt. 121, p. 4) is  
 6 completely disingenuous, as both Sykes-Bonnett and Groo have testified that Sykes-Bonnett  
 7 participated in TeamViewer sessions with customers, as well as independent contractors. Groo  
 8 Depo, 12:15-20; Sykes-Bonnett Depo, 32:11-33:5, 58:22-23; 175:13-15. Likewise, the  
 9 TeamViewer sessions conducted with independent contractors is not the only focus of the  
 10 inquiry. Accordingly, Plaintiff has complied with any obligation it has to narrowly tailor the  
 11 Subpoena, and is entitled to the information it seeks under the broad scope of discovery provided  
 12 under the federal rules.

#### 14 **IV. Defendants' Privacy Concerns are Overstated and Adequately Addressed by the** 15 **Applicable Protective Order**

16 Defendants' contention that the Subpoena seeks Defendants' confidential trade secrets  
 17 belies the text of the Subpoena. The Subpoena requests only non-content information and thus  
 18 will not lead to the disclosure of any substantive intellectual property or confidential information.  
 19 To the extent that the Subpoena will reveal Defendants' industry contacts, Defendants provide no  
 20 support for the proposition that industry contacts constitute a "trade secret" or "confidential  
 21 information."<sup>1</sup> Further, Plaintiff has demonstrated a substantial need for that information. As set  
 22

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23 <sup>1</sup> In fact, the primary case Defendants' cite in support of their misguided contention that the court may quash  
 24 a subpoena if it requires disclosure of a trade secret, *In re eBay Seller Antitrust Litigation*, 2009 WL 10677051, at \*4  
 25 (W.D. Wash. Aug. 17, 2009), is unpublished, non-binding, and appears to be mis-cited (though it is difficult to  
 confirm the Defendants mis-cited it because Defendants fail to provide a case number.)

1 forth above, Plaintiff must be able to identify the individuals and/or entities to whom  
2 Defendants' have provided HP Tuners' proprietary information in order to obtain adequate  
3 recourse for Defendants' misdeeds. Defendants have admitted that they have provided HP  
4 Tuners credits via TeamViewer, but refuse to provide the identities of the individuals and entities  
5 with whom they have engaged in TeamViewer sessions. Thus, Plaintiff has no other alternative  
6 than to request via Subpoena such identities in order to determine the true scope of Defendants'  
7 misdeeds and obtain adequate recourse through the courts. *See Compaq Computer Corp. v*  
8 *Packard Bell Electronics, Inc.*, 163 F.R.D. 329, 338 (N.D. Cal. 1995) (discovery is virtually  
9 always ordered once the movant has established that the secret information is both relevant and  
10 necessary.”)

12 Furthermore, the Protective Order that has been previously entered in this case provides  
13 protection against Defendants' confidentiality and privacy concerns. The parties jointly  
14 submitted and the Court entered into a stipulated Protective Order that governs the production of  
15 documents during this litigation. Dkt. 39. The Protective Order provides that “a receiving party  
16 may use confidential material that is disclosed or produced by another party or by a non-party in  
17 connection with this case only for prosecuting, defending, or attempting to settle this litigation.”  
18 Dkt. 34-1. HP Tuners agrees in advance that any documents produced by TeamViewer will be  
19 treated as Confidential within the scope of the Protective Order. The privacy concerns  
20 Defendants raise regarding disclosure of the identities of parties with whom Sykes-Bonnett has  
21 been in communication are remedied by the confidentiality provisions contained in the Protective  
22 Order, and Plaintiff agrees that any documents produced by TeamViewer will be treated as  
23 Confidential within the scope of the Protective Order.  
24  
25

**V. Defendants are Not Entitled to Fees**

Defendants' request for an award of attorneys fees should be denied for the same reasons that the Motion should be denied. Plaintiff is seeking highly relevant information that is not obtainable through alternative means. The Subpoena is narrowly tailored and based upon evidence and sworn testimony that TeamViewer is in possession of relevant evidence. Notably, Defendants have previously requested this court provide sanctions against Plaintiff for failing to attach the applicable subpoena to a motion to quash (Dkt. 40); however, Defendants themselves have hypocritically failed to provide the relevant Subpoena to the Court in its instant Motion to Quash.

For the foregoing reasons, Defendants' request for attorneys fees should be denied.

**CONCLUSION**

In consideration of the foregoing, this Court should DENY Defendants' Motion to Quash.

Dated: November 26, 2018

Respectfully submitted,

s/ Stephen G. Leatham

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Attorneys for Plaintiff HP Tuners, LLC

**CERTIFICATE OF SERVICE**

I hereby certify that on November 26, 2018, I caused the foregoing to be electronically with the Clerk of Court using the **CM/ECF system** which will electronically send Notice to all Counsel of Record.

*s/ Stephen G. Leatham*  
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